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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090

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U.S. Citizenship  
and Immigration  
Services

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FILE:

SRC 07 098 52328

Office: NEBRASKA SERVICE CENTER

Date: **MAR 05 2010**

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
Perry Rhew

Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a mounting and dye cutting business. It seeks to employ the beneficiary permanently in the United States as a first line supervisor/manager of production and operating (corrugated mounting and dye cutting supervisor.) As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position as the petitioner failed to demonstrate that the beneficiary had 48 months of prior qualifying employment experience as required by the ETA Form 9089. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's May 3, 2008 denial, the single issue in this case is whether the petitioner has shown that the beneficiary is qualified to perform the duties of the proffered position. The director noted deficiencies in the experience letter in the record written by [REDACTED] which, according to the petitioner, establishes that the beneficiary had 48 months work experience in the proffered position as of the priority date.<sup>1</sup> The director also noted that the beneficiary failed to list on the ETA Form 9089 that he had gained any qualifying work experience at [REDACTED].

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by the DOL and submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted on October 3, 2006.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.<sup>2</sup> On appeal, counsel submitted a brief, a second letter from [REDACTED]

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<sup>1</sup> This experience letter is not dated.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in this case provides no reason to preclude consideration of any of the documents newly submitted on appeal.

[REDACTED] dated July 1, 2008, and copies of evidence previously submitted.

On appeal, counsel indicated that the revised July 1, 2008 letter from [REDACTED], California, demonstrates that, as of the priority date, the beneficiary had the required qualifying experience as defined on the ETA Form 9089.

To determine whether a beneficiary is eligible for an employment based immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The ETA Form 9089, section H, items 4 through 14, set forth the minimum education, training, and experience that an applicant must have for the position of first line supervisor/manager of production and operating (corrugated mounting and dye cutting supervisor). Here, section H, items 4 through 14 indicate that there are no minimum educational requirements or training requirements to qualify for the proffered position, and that the applicant must have at least 48 months of experience in the proffered position. The petitioner did not allow for the applicant to gain qualifying experience in any related occupation. There are no additional special requirements for the position listed on the ETA Form 9089.

The duties of the proffered position as stated at section H, item 11 are to "[v]erify dimensions and alignments of finished parts for quality and conformance to specifications. Train operators to run mounting and die-cutting machines. Oversee and supervise 15-20 machine operators and assistant operators."

At sections J, K and L of the ETA Form 9089, the beneficiary set forth his credentials and then signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. At section K where the beneficiary is required to list "all jobs [he] has held during the past 3 years" and to "list any other experience that qualifies [him] for the job opportunity for which the employer is seeking certification," the beneficiary stated that he worked for the petitioner in the proffered position from October 3, 2005 through October 3, 2006. The beneficiary did not list any other work experience or additional information concerning his employment background on that form.

The record also contains the Form G-325, Biographic Information, submitted with the beneficiary's application to adjust status to lawful permanent resident status which the beneficiary signed on August 15, 2007. On that form in the section which requests information about the beneficiary's previous employment, he stated that from October 2005 through the date that he signed that form he worked as mounting supervisor for the petitioner, and that from 1993 through 2005, he held the position of "Lead

Person” at [REDACTED]. The beneficiary provided this information and signed the Form G-235 above a written warning that severe penalties are provided by law for knowingly and willfully falsifying or concealing a material fact on that form.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

On the ETA Form 9089, the beneficiary indicated that, as of the priority date, his only relevant qualifying work experience is his 12 months of experience working for the petitioner in the proffered position. The beneficiary’s statements regarding his previous employment experience on the Form G-325 indicate too that his only qualifying experience as of the priority date are his twelve months of experience in the proffered position working for the petitioner. The first experience letter submitted into the record from [REDACTED] is on [REDACTED] Brea, California letterhead stationery. In this letter, [REDACTED] stated:

I have known [the beneficiary] for the past 12 years. It has been my pleasure to mentor him in the operations of various types of dye cutting and mounting equipment. Among the machinery are [REDACTED] Stock automatic spot moulder. He has also learned how to handle the production of point of purchase displays. Please feel free to call me if you have any questions.

As the director pointed out in the notice of decision, this letter does not list the beneficiary’s start date and end date at [REDACTED]. It does not list the specific position held by the beneficiary or the specific duties that he carried out while in this position. [REDACTED] indicated only that he knew the beneficiary for 12 years, that he mentored the beneficiary in certain types of dye cutting and mounting equipment, and that the beneficiary knew how to handle the production of point of purchase displays. The director underscored that the beneficiary did not list any experience at Pacific [REDACTED] on the ETA Form 9089 where he was required to list all his relevant,

<sup>3</sup> The correct spelling is [REDACTED]. See [REDACTED] (accessed March 1, 2010).

qualifying work experience. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976)(where the BIA notes that if the beneficiary's claimed qualifying experience is not listed by the beneficiary and certified by the DOL on the labor certification application, this undermines the credibility of the assertion that the beneficiary has such experience.)

The employment experience letter dated July 1, 2008, submitted on appeal, is not on letterhead stationery. The signature line of this letter indicates that [REDACTED], wrote the letter. However, the signature on this letter is clearly not written in the same handwriting as the signature on the first letter submitted into the record signed by [REDACTED] which is on [REDACTED] letterhead stationery. This second, revised letter indicates that from 1993 through 2005, the beneficiary worked as supervisor of the manufacturing plant at [REDACTED] where he supervised and trained 8 to 15 employees. The letter states that: the beneficiary instructed employees on production and efficiency of plant operations; he explained and resolved problems with work production; he served as technical advisor in manufacturing; he shipped and received, assuring all merchandise cartons display advertising labels; he operated machines: bob die cutters, stock machine-mount labels on cartons, dye-cut, adjustments to shape cutting; and he checked productivity of plan production orders and made sure that machines were operating correctly.

This second experience letter does not indicate that the beneficiary ever obtained experience verifying dimensions and alignments of finished parts for quality and conformance to specifications, as required by the ETA Form 9089, as certified. Moreover, this letter contradicts information provided by the beneficiary on the ETA Form 9089 and the Form G-325 which indicates that the beneficiary's only work experience in the proffered position of first line supervisor/manager of production and operating (corrugated mounting and die cut supervisor) is his 12 months of experience obtained with the petitioner immediately before the priority date. The Form G-325 specifically lists the beneficiary's position at [REDACTED] as that of "lead person" and not supervisor.<sup>4</sup> This letter is also inconsistent with the first experience letter submitted in that the first letter indicates that the beneficiary's duties and position at [REDACTED] was less advanced than that described in the July 1, 2008 letter; and the signature of [REDACTED] on the July 1, 2008 letter is clearly not written in the same handwriting as that on the first letter submitted into the record. These discrepancies cast doubt on the authenticity of both experience letters submitted by the petitioner.

Doubt cast on any aspect of the proof submitted by a petitioner may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec.

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<sup>4</sup> The petitioner must resolve inconsistencies in the evidence by providing independent, objective proof of where the truth lies, and attempts to merely explain inconsistencies without such independent evidence will not suffice. *See Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). The petitioner did not state on the ETA Form 9089 that the candidate could use experience in any alternate, related occupation to qualify for the proffered position.

582 (BIA 1988).

This office finds that the beneficiary's two experience letters submitted into the record are not probative in this matter, and that the petitioner has submitted no independent, objective evidence to overcome the discrepancies in the record regarding its claim that, as of the priority date, the beneficiary had 48 months of experience in the proffered position.<sup>5</sup>

Thus, the evidence does not establish that, as of the priority date, the beneficiary had acquired 48 months of experience in the proffered position, as required by the ETA Form 9089 as certified by the DOL. Therefore, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

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<sup>5</sup> The petitioner did submit the beneficiary's 2004, 2005 and 2006 Forms W-2, Wage and Tax Statement, issued by [REDACTED] which is independent evidence that the beneficiary worked for this company in 2004, 2005 and 2006, earning \$35,359, \$34,076 and \$1,410.16, respectively. However, it is not independent evidence that the beneficiary carried out the duties of the proffered position in those years while working for [REDACTED]. Moreover, even if the petitioner did submit credible evidence that the beneficiary worked in the proffered position at [REDACTED] in 2004, 2005 and 2006, the petitioner still would not have established that the beneficiary had 48 months full-time experience in the proffered position as of the priority date of October 3, 2006. The AAO notes incidentally that the petitioner also submitted the beneficiary's 2005 and 2006 Forms W-2 issued by the petitioner. These forms indicate that the beneficiary earned \$2,075 and \$42,048.53, respectively, in those years while employed by the petitioner.